MEMORANDUM

From: Cynthia Koehler, Environmental Defense Fund
Kim Delfino, Defenders of Wildlife
Doug Obegi, Natural Resources Defense Council
To: Jerry Meral, California Natural Resources Agency
David Nawi, U.S. Department of the Interior
Re: PERMITTEE STATUS FOR WATER CONTRACTORS IN BDCP

This memorandum addresses issues associated with granting permittee status in the Bay Delta Conservation Plan (BDCP) process to the state and federal water contractors who divert water south of the Delta from the Central Valley Project (CVP) and State Water Project (SWP), and/or to the joint power authority, State and Federal Contractors Water Agency (SFCWA), which is controlled by those entities.

The question is whether granting the contractors status as holders of the Natural Community Conservation Plan/Habitat Conservation Plan permit – in addition to DWR – would impair the independent ability of the state and federal agencies to administer the BDCP and protect public trust resources.

In our view, the answer is that it clearly would. Granting permittee status to the contractors would critically impair the state and federal governments' independent ability, over the next fifty years, to administer the BDCP for the benefit of public trust resources by allowing entities located outside the Delta to directly and indirectly control administration, adaptive management and operations of a Delta-based plan through funding control, decision-making authority, contractual claims and litigation. Granting permittee status to the contractors is likely to violate provisions of state and federal law, jeopardizing the entire BDCP project. It could also undermine confidence in the BDCP process by other stakeholders and the public at large.

We respectfully recommend against this course of action.

I BACKGROUND: CESA, NCCPA and ESA

State Law: The California Endangered Species Act (CESA)(Fish & G. Code §§ 2050 et seq.) prohibits the taking of any species listed as endangered or threatened with extinction (collectively referenced hereinafter as "endangered species") without authorization from the California Department of Fish and Game (DFG).[1] With respect to state agencies, boards and commissions, CESA requires a higher duty of care than for non-state entities stating:

> [I]t is the policy of this state that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter. (§ 2055.)

CESA defines "conserve" broadly as using:

[1] All statutory references are to Fish and Game Code unless otherwise indicated.

> [A]ll methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. These methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition, restoration and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Although the State Water Project operated by the Department of Water Resources (DWR) and the Central Valley Project, operated by the U.S. Department of the Interior, Bureau of Reclamation (Reclamation or Bureau) are operated in tandem under the *Coordinated Operations Agreement,* the Bureau of Reclamation asserts it is not subject to state law.[2] This means that, at present, DWR is the only clear BDCP permittee and the SWP are the only facilities which will be permitted under the Natural Community Conservation Planning Act (NCCPA) (§§ 2800 et seq.). Note that the California legislature declared that for the BDCP to be eligible for state funding, it *must* be a Natural Community Conservation Plan (NCCP).[3] This settled the issue of whether the BDCP would seek a CESA permit under § 2081 or instead proceed under the State's Natural Community Conservation Planning Act.

The NCCPA provides that at the time an NCCP is approved CDFG "may authorize by permit the taking of any covered species whose conservation and management is provided for in the [plan]." (§ 2835.) As noted above, "conservation" is a recovery standard. This is a higher standard than the avoidance and mitigation required under CESA § 2081 permits, and it is the reason public funds are contributed to NCCPs.

In California, water is a public trust resource belonging to all of the people of the State. Cal. Water Code § 102. Because of this, water rights are "usufructory," meaning the right to use something you do not own. Similarly, DWR is an agency for all of the people of the state. Its mission is to "manage the water resources in cooperation with other agencies, to benefit the State's people and to protect, restore, and enhance the natural and human environments." As an agency of the Executive Branch, DWR can also be held responsible to all of the people of the state through the checks and balances of legislative oversight by a representative government.

Federal Law: The federal Endangered Species Act is similar to CESA in many respects. Overall, the statute prohibits "any person" from taking or harming any listed species.[4] Section 7(a)(2) of the ESA applies to federal agencies and requires that they "insure that any action

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2 This is an untested theory and we do not concede its legal validity. The Reclamation Law of 1902 (43 USC § 383) states, "Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation…and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws…" One can assume, *arguendo,* that CESA, as applied to CVP impacts on aquatic species, relates primarily to the control, appropriation, use, or distribution of water used in irrigation. *See, e.g., NRDC v. Patterson,* 333 F.Supp.2d 906, 913-914 (E.D. Cal. 2004) (holding that section 5937 of the Fish and Game Code was not preempted by Section 8 of the Reclamation Act of 1902, and holding that this provision of state law applied to Bureau of Reclamation's operations at Friant Dam).

3 Delta Reform Act of 2009 (SB 1 (Simitian) 2009-10 Seventh Extraordinary Session); Water Code § 85320(b)(1).

4 ESA, Sec. 9.

authorized, funded or carried out … is not likely to jeopardize the continued existence" of any listed species or otherwise "result in the destruction or adverse modification of" critical habitat.[5] Section 7(a)(1) of the ESA requires that, "All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title." In this sense, like CESA, the federal statute imposes a higher standard on federal agencies than private or other non-federal parties.

Federal agencies, in this case Reclamation, whose actions may result in such damage must "consult" with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS), as appropriate. Those agencies must issue Biological Opinions identifying alternative approaches to be taken by the agency in implementing the agency action, in this case, operation of the CVP.

Section 10 of the ESA applies to non-Federal parties and allows the incidental taking of listed species by states, local governments and private parties pursuant to an incidental take permit. In order to receive such a permit, an applicant must submit a Habitat Conservation Plan (HCP) that meets certain criteria.[6] An approved HCP gives rise to "regulatory assurances" under the federal No Surprises policy.[7]

Critically, 50 CFR Sec. 17.22(b)(5), which codifies HCP regulation, states expressly that No Surprises assurances **"cannot be provided to Federal agencies."** (Emphasis added.) When promulgated, the federal government stated that it was issuing the revised rules in part to clarify that No Surprises assurances "do not apply to Federal agencies who have a continuing obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA." 63 Fed. Reg. 8867 (Feb. 23, 1998). In addition, the notion that the FWS and/or NMFS would be precluded from imposing on a federal agency additional terms and conditions designed to minimize or mitigate excessive take conflicts with the obligation to reinitiate consultation under Section 7(a). Thus, the law expressly prohibits Reclamation and federal water contractors from obtaining Section 10 "No Surprises" assurances and prohibits the FWS/NMFS from approving permits that are structured to undermine the agencies' Section 7 obligations.

The legal consequences of permittee status under the ESA and NCCPA:

In the simplest terms, the permittee has primary responsibility for implementation of the HCP/NCCP, authority to regulate the activities covered by the permit, and standing to challenge a finding of noncompliance by the permitting agencies. In the case of BDCP, this could include operations of the isolated conveyance facility, but also all decisions about funding, priorities, how to proceed with implementation, monitoring, staffing etc. As all parties acknowledge, the permit holder would have tremendous sway and influence over virtually every aspect of BDCP

[5] 16 USF 1531, et seq.
[6] See, 50 CFR parts 17 and 222
[7] The Services codified the ''No Surprises'' policy into a final rule, 50CFR 17.22(b)(5), 17.32(b)(5) and 222.307(g), on February 23, 1998 (63 FR8859).

implementation. Permittees occupy an entirely different legal relationship to the program than non-permittees.

As discussed further in this memorandum, granting permittee status to the contractors may result in the following consequences:

- Provide the contractors with the authority to amend the terms of the BDCP NCCP, which may restrict the authority of DWR to amend its terms;
- Provide CVP contractors with regulatory assurances, in violation of federal law; and
- Provide the contractors with additional influence and authority over implementation of BDCP, which may limit the ability and authority of DWR and Reclamation with regard to implementation.

Inconsistency with State and Federal Laws:

At bottom, the problem with granting the contractors permittee status is that this ignores the fact that BDCP implementation – which will be run by the permittees -- involves fundamental state and federal governmental functions that cannot, and should not, be delegated to the water contractors. Numerous state and federal laws, such as the Central Valley Project Improvement Act (CVPIA), require that the SWP and CVP be operated by the state and federal governments, respectively.[8] Federal law prohibits delegating the Secretary's policymaking role and authority. *See National Park and Conservation Association v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999).

State and federal laws also mandate that the agencies oversee and implement programs to manage and restore the Bay-Delta estuary.[9] Similarly, the Delta Reform Act of 2009 (ch. 5, stats. 2009) reinforces the obligation that the State and Federal agencies are to establish policy for and management of the Bay-Delta estuary. That Act explicitly finds that the Bay-Delta estuary is a "critically important natural resource for California and the nation." Water Code § 85002. It establishes numerous state policies for management of the Bay-Delta, including the co-equal goals, protection of the historic and cultural values of the Delta, and establishing a new governance structure "with the authority, responsibility, accountability, scientific support, and

[8] *See, e.g.*, CVPIA, P.L. 102-575, Title 34, § 3406(b) ("The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under state and federal law, including but not limited to the federal Endangered Species Act, 16 U.S.C. s 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project."); Cal. Water Code §§ 12931, 11451, 12895; *see* Cal. Water Code § 85321 ("The BDCP shall include a transparent, real-time operational decision-making process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.").

[9] *See, e.g.*, CalFed Bay-Delta Authorization Act, P.L. 108-361, § 102(1) ("The terms "Calfed Bay- Delta Program" and "Program" mean the programs, projects, complementary actions, and activities undertaken through coordinated planning, implementation, and assessment *activities of the State agencies and Federal agencies as set forth in the Record of Decision*.") (emphasis added); Cal. Water Code § 78536.5 (requiring that the Secretary of the Resources Agency shall carry out the CALFED Bay-Delta program).

adequate and secure funding to achieve these objectives." Water Code § 85020. Elevating the exporters to permittee status and giving them significant influence over BDCP management decisions would necessarily lead to a bias in implementation, as Delta, fishing and environmental interests would not be granted equal status. The CVPIA also established "mitigation, protection, and restoration of fish and wildlife" as a project purpose of the CVP, along with other purposes, such as water supply (P.L. 102-575, Title 34, § 3406(a)). Thus, both state and federal law establish environmental protection and restoration as co-equal project purposes for the CVP and SWP. Granting water users broad control over the BDCP is inconsistent with state and federal requirements regarding co-equal goals.[10]

In addition, under the Endangered Species Act and its implementing regulations, the water contractors lack the authority to be a permittee. For instance, page 3-2 of the HCP handbook states that, "The permittee must therefore be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit." The water contractors lack the authority to change water operations of the CVP and SWP, they lack rights to the water that would be diverted under BDCP, and they lack the authority to seek a permit to change the point of diversion, which are key activities proposed in BDCP. Therefore, they lack the legal authority to be permittees under BDCP. The only appropriate, legal permittees in the BDCP process are state and federal agencies that own and operate the relevant facilities and hold the relevant water rights.

Finally, as indicated above, federal agencies cannot obtain "No Surprises" assurances under section 10 of the Endangered Species Act. 50 C.F.R. § 17.22(b)(5). Authorizing the CVP contractors to be permittees appears intended to circumvent this prohibition and give Reclamation's contractors assurances that would not be available to the agency itself. As noted above, the Bureau is the only proper and legal operator of the CVP, and the Bureau holds the water rights for the CVP. To the extent that the assurances provided to CVP contractors could reduce or eliminate the ability of the CVP to change operations and/or reduce diversions so as to avoid jeopardy to listed species or protect the environment in the future, such assurances violate the ESA and its implementing regulations. See, *Sierra Club v. Marsh*, 816 F. 2d 1376 (9th Circuit 1987).

II APPROPRIATE ROLES FOR THE PARTIES IN BDCP

The BDCP will involve federal incidental take permits (and Biological Opinions) and state incidental take permits. The SWP and CVP are massive water facilities owned and operated by the state and federal government for a variety of public uses including but not limited to the benefit of the water contractors. Given the analysis above, it is our view that DWR is the appropriate permit applicant under both state and federal endangered species schemes.

[10] The Delta Reform Act also implies that the Department of Water Resources, with the Department of Fish and Game, are the appropriate agencies charged with BDCP implementation. *See* Water Code §§ 85320(c), (f). Indeed, the Legislature Council digest states that, "The bill would impose requirements on the Department of Water Resources in connection with the preparation of a specified Bay Delta Conservation Plan (BDCP)." SB 1 as amended November 3, 2009, Legislative Counsel's Digest, at 3.

At the same time, we concur that the focused involvement of the water contractors in implementation is not only desirable but essential to the success of the BDCP. That role, like that of the NGOs, the local communities and other keenly interested parties, can be fully addressed without the extraordinary step of extending permittee status to parties that neither own nor operate the facilities at issue. These roles include participation on the proposed steering and management committees, and potentially direct implementation of a number of conservation plan actions.

III PERMITTEE STATUS FOR THE CONTRACTORS IS NOT APPROPRIATE AND PRESENTS SUBSTANTIAL RISKS TO BDCP IMPLEMENTATION AND SUCCESS.

A. Conflicts of Interest.

Permittee status for the contractors is inappropriate in light of the substantial conflicts of interest involved. As all parties recognize, the BDCP permittees will control a wide range of decisions, including most critically the adaptive management program at the heart of the BDCP. In smaller HCPs or NCCPs much of the decision-making is embodied in the conservation plan, with implementation requiring limited determinations – the plan is either being implemented or it's not. The BDCP does not involve a shopping center with a few acres of associated wetland mitigation; it involves instead a massive five-decade ecosystem restoration and water delivery effort that is premised on the concept of a constantly evolving plan driven by an untested adaptive management approach. It will be an ongoing exercise in science and professional judgment that will affect future ranges for water project operations and water exports.

These decisions must remain squarely within the purview of the state and federal agencies responsible for the CVP and SWP. To use just one example, effective monitoring and research are necessary for adaptive management to work, but if BDCP's research and monitoring priorities are structured to avoid answering some of the tough questions, these programs will fail to achieve their mandates. The credibility of BDCP's scientific research and monitoring depends upon its independence from the contractors.

Moreover, as all parties agree, the decisions involved in BDCP's implementation go well beyond operations and include the hiring of staff, establishing and managing budgets, priority setting, selection of consultants, determination of consultant scopes of work, review and approval of consultant work products, integration of the results of scientific reviews, negotiating permit amendments, making adaptive management decisions, managing day-to-day operations, addressing the concerns of non-permitee stakeholders and more. Granting the exporters substantial control and influence over these issues would create additional potential conflicts and jeopardize restoration efforts.

B. Increased Risk of Conflict in Plan Implementation and Reduced Ability of State and Federal Agencies to Implement a Cohesive Program.

While there will be many voices engaged in implementation, the permittee will be in charge of a cohesive plan of implementation. This will necessarily involve substantial negotiation between different stakeholder and agency views and priorities as well as the differing professional judgment of various experts. But it is the permittee(s) who will decide, for example, to subcontract with those entities it determines will most effectively carry out various aspects of the Plan -- including the SFCWA, any individual water contractor, the Delta Conservancy, or non-governmental entities.

If DWR is the permittee, these decisions will ultimately be made by the State. However, if the contractors are also permittees, they will have their own coverage and could claim that actions that they wish to implement are part of the plan because those actions fall under "their permit." They can also fund their actions independently, regardless of DWR's priorities and reduce, or attempt to reduce, funding to the program by an equivalent amount by claiming those actions contribute to the program whether or not DWR agrees. This could leave key portions of the program underfunded and compromise the ability of DWR (and the Executive branch) to administer the program on behalf of all of the people of the state.

This potential bifurcation of funding is already evident in the existing relationship between DWR and the water contractors. In regard to the existing contractor-influenced "off-budget" funding for DWR, the Legislative Analyst's Office remarked that the SWP is "integrally linked to other programs, but its operation has created significant liabilities for other programs and funding sources, including the General Fund, without any legislative oversight...There is also growing recognition of SWP's role in contributing both to the causes of, and the potential solutions to, water–related problems in the Delta. This has major policy and fiscal implications for a number of state programs."[11]

Moreover, as permittees, the SFCWA and the contractors could go beyond their own relationship with DWR and insist that their names be included on all contracts between DWR and other entities to implement the program by claiming a need to ensure that "their" permit remains valid. This would both dilute DWR's authority and could place other contracts at risk for leveraging or termination if the SFCWA disagrees with a decision of DWR regarding implementation of the project.

As indicated above, as a state agency, DWR is under a higher duty of care for the ecological resources at issue than the water contractors. The BDCP is certain to be extremely complex and contentious to implement; the chances of different views with regard to ecological priorities, operations, funding and professional determinations regarding science are reasonably foreseeable. Providing the contractors with permit status on par with DWR runs counter to its ability to satisfy its legal mandate in myriad ways.

[11] LAO: http://www.lao.ca.gov/analysis_2009/resources/res_anl09004005.aspx.

C. Creating Problems in Related Agency Efforts .

The BDCP may have substantial implications for many related agency processes (e.g. upstream ESA requirements for the CVP and SWP, State Board requirements for the CVP and SWP, State Board requirements for other water users, and CVPIA requirements for the CVP.) Establishing the water users as permittees could give them far greater influence these related processes for years to come. In each of these forums, the exporters might assert that, unless their position prevails, terms of the BDCP would need to be renegotiated. In our view, this position would be incorrect, because, as discussed above, the exporters lack the characteristics of a permittee under state and federal law. Nevertheless, elevating the exporters to permittee status could create confusion and delay in the implementation of the BDCP.

D. Standing of Contractors to Claim Certain Sovereign Powers Related to the SWP or to Modify Permit Terms.

Elevating the SFCWA and its members from subcontractor status to permit holders would fundamentally impair DWR's ability to administer the Plan for the benefit of all Californians. As permittees, the water users would be signatories to the Implementation Agreement, a legally binding contract to which they would then be direct parties, unlike any of the other stakeholders. They would thus have elevated legal standing with regard to any governmental effort to change that Agreement, or even an effective veto power in this regard.

DWR is the sole entity responsible for the State Water Project's compliance with state and federal endangered species laws today. If the Department of Fish and Game had concerns about implementation of the BDCP and/or the effect of project operations on covered species, it would provide notice to DWR under the legal process to address and cure whatever defects are at issue.[12] *Permittees* may file objections to a proposed action, and it is the *permittee* who negotiates with DFG as to how a potential or actual failure to meet permit terms must be cured. Allowing the contractors to be permittees interposes the contractors between two state agencies under the Natural Resources Agency.

The legal problem stems from the complexity of the plan and the high stakes involved. For example, imagine DFG approaches DWR with new science which indicates export pumping should be curtailed because impacts to the fisheries are greater than anticipated. If DWR holds the permit, DWR can agree and make a change. The contractors could have input into this discussion via their representation on a "BDCP Implementation Board." But ultimately, DWR, as the sole agency holding the permit, would make the decision. If the contractors disagree with that decision, they would have legal remedies in court to assert that the decision is "arbitrary and capricious," etc. However, if the contractors are the co-holders of the permit, they could choose to independently disagree and attempt to preclude the State from proceeding. It would be their permit too.

[12] California Code of Regulations, Title 14, Section 783.7 sets out the criteria for permit suspension and revocation which includes notice *to the permittee* and an opportunity to cure.

Indeed, the same contractors who seek to be permit holders in BDCP have gone to court making the extraordinary claim that the Department of Water Resources is not subject to the California Endangered Species Act because this statute "infringes" on DWR's "sovereign function of operating the State Water Project." *Kern County Water Agency v Watershed Enforcers,* -- (2010). The California Court of Appeal rejected that challenge noting, among other reasons, that the contractors lacked standing to "assert the protection of DWR's sovereign powers." *Id.* Granting the contractors permittee status for an NCCP/ESA take permit for the SWP potentially opens the door to that argument once again. As permittees, the contractors could be empowered to challenge permit conditions, fight adaptive management measures, or refuse any action with which they disagree, and do so while standing essentially in the same (legal) shoes as DWR. Again, given the history of disagreements among the parties regarding protections for the Delta in court and elsewhere, elevating the water contractors to permittee status could risk institutionalizing conflict and gridlock.

E. Changed Relationship with DWR and Lack of Legislative Oversight.

While the members of SFCWA are public agencies, their missions are narrowly tailored to preserving and increasing export water supplies in their own service areas. For example MWD's mission "is to provide its service area with adequate and reliable supplies of high-quality water to meet present and future needs."[13] Likewise KCWA's mission is "to preserve and enhance Kern County's water supply, the main ingredient for the well-being of the economy."[14] Neither MWD nor KCWA is located in the Delta.

If the contractors are co-permittees, they do not need to invest in DWR's program through a fixed charge. They can argue that as BDCP permittees they can manage their portion of the program. They can pay their own employees and "loan" them to DWR (the current proposal), they can underwrite an office that is not under the physical jurisdiction of DWR (also the current proposal), they can fund the portions of the program that meet their own objectives -- other stressors, certain restoration actions, specific science (what has occurred during the planning of the BDCP), and then they can threaten to pull all of that support if they do not agree with management decisions (also what has occurred during BDCP planning). In other words, if the funding for the program is not integrated through the contracts managed by DWR as the permittee, it could become tied to specific outcomes desired by the contractors as permittees. This damages the independence and ultimately the success of the program.

The response that this scenario is unlikely because it would threaten the continuity of the program and DFG would "pull the NCCP permit" (thus cutting off at least part of the domestic water supply for 25 million Californian's and 3 million acres of irrigated agriculture) is politically unpalatable and legally questionable. We are not aware of any situation in which the fishery agencies have been willing to take such a controversial step.

IV GRANTING THE CONTRACTORS PERMITTEE STATUS IS UNNECESSARY.

[13] http://www.mwdh2o.com/mwdh2o/pages/about/about01.html
[14] http://www.kcwa.com/about_kcwa/about.shtml

The contractors maintain that they should be permittees for a variety of reasons that boil down to the following assertions: (1) they are better placed to run a program of this magnitude than the state and federal agencies; (2) they are paying for the facility and therefore should have an elevated role in decision making; and (3) as permittees they would share a direct legal obligation to ensure compliance. These arguments are not compelling and do not overcome the weight of the objections set forth above.

First, as indicated above, everyone fully expects the water contractors to play a large and substantial role in BDCP implementation as they have throughout the process. Permittee status is not necessary to ensure a meaningful level of input and participation. The governance proposals envision various boards, committees and direct implementation opportunities. There is little question that the water contractors views, priorities and demands will be heard throughout the implementation process without elevating their participation to permittee status.

Nor is the financial role the contractors may play relevant to permittee status in this situation. Large public water projects are intended to be paid for by the contractors who benefit primarily from them. Indeed, the anticipated financing for a Delta facility under the BDCP is a continuation of current and past policies. SWP contractors have largely financed the costs of current State Water Project, without being awarded permittee status or direct control over key SWP decisions. State law already requires that the contractors pay the full costs of planning, construction, environmental analysis, and mitigation for any new facilities. That financial obligation does not confer ownership or operator status on those contractors.

Moreover, DWR has already signed agreements with the water contractors assuring them that if new conveyance "is approved to proceed with construction, DWR intends to issue Revenue Bonds to pay for such construction. DWR shall include in the first issue of Revenue Bonds...an amount sufficient to reimburse the Contractor and all other Participating SWP Contractors for all planning costs paid."[15] These revenue bonds are to be repaid through the contracts for water and power over the next fifty years. Much could change in fifty years. This means that the current contractors who are advancing funds will be made whole and leaves the state the flexibility to contract with whom it wishes. The existing entities do not need to be locked in by virtue of also holding the permits. In addition, nothing in the BDCP has established who will pay for what other aspects of the project to date.

Finally, there are many vehicles to ensure that the water contractors comply with their legal obligations well short of becoming permittees. Implementation agreements or other contractual arrangements that include third party rights of enforcement, state and federal agencies – and other stakeholders – can play this role as well as other legal assurances beyond the scope of this memorandum.

CONCLUSION

[15] *State of California Natural Resources Agency, Department of Water Resources, Agreement for Funding Between the Department of Water Resources and Metropolitan Water District of Southern California for the Costs of Environmental Analysis, Planning and Design of Delta Conservation Measures, Including Delta Conveyance Options (SWPAO #09900)(March 12, 2009)*

There is broad opposition among non-export water users, fishing interests, environmental organizations, local governments, Delta agriculture and others to taking the unusual step of granting permittee status to the water contractors. Many perceive that the export contractors have had a disproportionate influence within the BDCP process, and granting them permittee status could exacerbate concerns and increase the obstacles facing BDCP, thus jeopardizing the success of this program.

In our view, the issue of permittee status has become an unnecessary distraction from the important work that needs to be done in the BDCP. As established above, there is no need for the contractors to be elevated to the status of the federal and state agencies that own and operate the State and Federal Water Projects that are the subject of the HCP/NCCP. Moreover, moving in this direction is more likely to destabilize rather than promote the success of this vital program. The conservation caucus, both organizations that have been part of the BDCP planning and those with an important interest in that process, are continuing to work together on this important issue.

Thank you for your consideration of our views.